

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Plaintiff filed a Complaint on July 2, 2008, seeking review of the denial by the Social Security Commissioner ("Commissioner") of plaintiff's application for a period of disability ("POD") and disability insurance benefits ("DIB"). On October 16, 2008, the parties consented to proceed before the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(c). The parties filed a Joint Stipulation on April 2, 2009, in which: plaintiff seeks an order reversing the Commissioner's decision and awarding benefits or, alternatively, remanding the case to the Commissioner for a new administrative hearing; and defendant asks that the Commissioner's decision be affirmed. The Court has taken the parties' Joint Stipulation under submission without oral argument.

**SUMMARY OF ADMINISTRATIVE PROCEEDINGS**

Plaintiff filed her application for a POD and DIB on October 25, 2004, alleging an inability to work since August 2, 2004, due to complications from hepatitis C and depression. (Administrative Record ("A.R.") 13, 101-03.) Plaintiff has past relevant work experience as a lamp painter, packer, administrative assistant, and aircraft assembler. (A.R. 14.)

The Commissioner denied plaintiff's claim for benefits, and plaintiff timely requested a hearing. (A.R. 81-86.) On January 22, 2007, plaintiff, who was not represented by counsel, appeared and testified, with the assistance of a Spanish language interpreter, at a hearing before Administrative Law Judge Robert J. Grossman ("ALJ"). (A.R. 20-78.)

In his written decision, the ALJ indicated that, plaintiff "stated at the hearing that she was amending her application to request a 'closed period' of disability from August 2, 2004 to July 2, 2005." (A.R. 13.) Notwithstanding the fact that if, in fact, plaintiff had so amended her application, then the 12-month durational requirement established by 42 U.S.C. § 423(d)(1)(A) would not have been met, the ALJ nevertheless addressed whether plaintiff was disabled from August 2, 2004, to July 2, 2005. (A.R. 19.)

On August 2, 2007, the ALJ denied plaintiff's claim (A.R. 13-19), and the Appeals Council subsequently denied plaintiff's request for review of the ALJ's decision (A.R. 2-4).

**SUMMARY OF ADMINISTRATIVE DECISION**

The ALJ found that plaintiff met the nondisability requirements for a POD and DIB, and was insured for benefits through June 30, 2006. (A.R. 18.) The ALJ further found that plaintiff had been engaging in substantial gainful activity since October 12, 2006. (*Id.*)

The ALJ determined that plaintiff had the following "severe" impairment: hepatitis C. (A.R. 18.) The ALJ found that the "medical evidence does not support the contentions of [plaintiff] and her husband," and plaintiff "was not limited to the degree she has alleged during the period in question." (A.R. 16-17.)

Consistent with the opinion of the consultative internal medicine examiner, Barry Gordon Gwartz, M.D., the ALJ found that plaintiff was able to: lift 20 pounds occasionally; lift and carry 10 pounds frequently; and walk and stand for six hours in an eight hour work day. (A.R. 18-19.)

Based on the ALJ's residual functional capacity assessment and the testimony of a vocational expert, the ALJ found that plaintiff would have been, and still is, able to return to any of her past relevant jobs. (A.R. 18.) Accordingly, the ALJ concluded that plaintiff was not under a disability, as defined in the Social Security Act, at anytime through June 30, 2006, her date last insured. (A.R. 19.)

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## STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to determine whether it is free from legal error and supported by substantial evidence in the record as a whole. Orn v. Astrue, 495 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (citation omitted). The "evidence must be more than a mere scintilla but not necessarily a preponderance." Connett v. Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). While inferences from the record can constitute substantial evidence, only those "'reasonably drawn from the record'" will suffice. Widmark v. Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006) (citation omitted).

Although this Court cannot substitute its discretion for that of the Commissioner, the Court nonetheless must review the record as a whole, "weighing both the evidence that supports and the evidence that detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of Health and Human Servs., 846 F.2d 573, 576 (9th Cir. 1988); see also Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d 1035, 1039-40 (9th Cir. 1995).

The Court will uphold the Commissioner's decision when the evidence is susceptible to more than one rational interpretation. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may review only the reasons stated by the ALJ in his decision "and may not

1 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d  
2 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse  
3 the Commissioner's decision if it is based on harmless error, which  
4 exists only when it is "clear from the record that an ALJ's error was  
5 'inconsequential to the ultimate nondisability determination.'" Robbins  
6 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006) (quoting Stout v.  
7 Comm'r, 454 F.3d 1050, 1055-56 (9th Cir. 2006)); see also Burch, 400  
8 F.3d at 679.

## 10 DISCUSSION

11  
12 Plaintiff alleges three issues: (1) whether the ALJ fully and  
13 fairly developed the record; (2) whether the ALJ considered plaintiff's  
14 treating physician's opinion properly; and (3) whether the ALJ erred in  
15 determining the credibility of plaintiff and her husband. (Joint  
16 Stipulation ("Joint Stip.") at 6.)

### 18 I. The ALJ Failed To Fully And Fairly Develop The Record.

19  
20 In social security cases, the law is well-settled that the ALJ has  
21 an affirmative "'duty to fully and fairly develop the record and to  
22 assure that the claimant's interests are considered.'" Tonapetyan v.  
23 Halter, 242 F.3d 1144, 1150 (9th Cir. 2001)(citations omitted). "This  
24 duty extends to the represented as well as to the unrepresented  
25 claimant." *Id.* When a claimant is not represented by counsel, an ALJ  
26 "must be especially diligent in exploring for all the relevant facts."  
27 *Id.* The ALJ's duty to develop the record extends from the basic premise  
28 that social security hearings are not adversarial in nature. Orcutt v.

1 Barnhart, 2005 WL 2387702, \*3 (C.D. Cal. 2005); see also Sims v. Apfel,  
2 530 U.S. 103, 111, 120 S. Ct. 2080, 2085 (2000) ("It is the ALJ's duty to  
3 investigate the facts and develop the arguments both for and against  
4 granting benefits"). "The ALJ's duty to supplement a claimant's record  
5 is triggered by ambiguous evidence, the ALJ's own finding that the  
6 record is inadequate or the ALJ's reliance on an expert's conclusion  
7 that the evidence is ambiguous." Webb v. Barnhart, 433 F.3d 683, 687  
8 (9th Cir. 2005)(citing Tonapetyan, 242 F.3d at 1150). "In cases of  
9 mental impairments, this duty is especially important." DeLorme v.  
10 Sullivan, 924 F.2d 841, 849 (9th Cir. 1990); see also Tonapetyan, 242  
11 F.3d at 1150 (an ALJ has a heightened duty to develop the record where  
12 the claimant is mentally ill and therefore unable to protect her own  
13 interests).

14  
15 Plaintiff contends that the ALJ failed to fully and fairly develop  
16 the record. (Joint Stip. at 6.) Specifically, plaintiff contends that  
17 the ALJ: was argumentative with plaintiff, who was unrepresented, at  
18 the hearing; failed to consider all evidence of record; and failed to  
19 conduct the appropriate inquiry with respect to missing administrative  
20 record pages and plaintiff's psychiatric treatment. (Joint Stip. at 7-  
21 11.) After reviewing the record, the Court agrees.

22  
23 The Court has read the hearing transcript in its entirety, and it  
24 is clear that the ALJ was unnecessarily argumentative with plaintiff,  
25 who was unrepresented and required the assistance of a Spanish language  
26 interpreter, during what should have been a proceeding that was "non-  
27  
28

1 adversarial in nature."<sup>1</sup> Orcutt, 2005 WL 2387702 at \*3. The ALJ  
2 repeatedly interrupted plaintiff's responses and, at one point during  
3 the hearing, blatantly mischaracterized the record by telling plaintiff  
4 that the consultative examiner "didn't think [plaintiff] was motivated  
5 to go to work" and that "[h]e thought [she] w[as] feeling not well and  
6 so [she] elected to take it easy rather than push [her]self to work."  
7 (A.R. 47-48.) The consultative examiner's report does not support the

8  
9 <sup>1</sup> In her portion of the Joint Stipulation, plaintiff points to the  
10 following exchange between the ALJ and plaintiff to demonstrate how  
argumentative the ALJ was with plaintiff during the proceedings:

11 ALJ: Yeah, but why should I believe that, why should I,  
12 number one, why should I believe that the  
13 medications made you ill, and why should I believe  
that you were so ill that you couldn't go to work?

14 CLMT: Why would I lie?

15 WTN: Can I speak to the claimant?

16 ALJ: No.

17 CLMT: Well, what would I lie for?

18 ALJ: To get benefits, that's why people come here.  
19 They, they come in here and I don't say, everybody  
20 lies, maybe no one lies, but the reason I'm here is  
21 to be sure that you're not lying. You're asking  
22 the Government to give you money, not a gift, that  
23 is not charity. This is not a social welfare  
24 program. This is a program based upon your  
25 inability to earn a living and you have the burden  
26 or [sic] proving that you are unable to earn a  
27 living. In your case, you're saying it was for a  
stated period of time, you're, you're saying I'm  
okay now, not like I'd like to be, but I'm okay to  
work, but you're also saying, I could not go to  
work and earn a salary in a competitive job for a  
year and a half, and why should I accept that as  
being true. What have, what have you brought me  
that proves that, aside from the fact that you say  
you are sick, who else says you were so sick that  
you couldn't work, and what have they said that  
proves it?

28 (A.R. 68-69.)

1 ALJ's assertion regarding plaintiff's lack of motivation. (See A.R.  
2 149-53.)

3  
4 Similarly, at the hearing, the ALJ repeatedly demanded that  
5 plaintiff, who received a high school education in Mexico, "tell me  
6 where I should look, what document, what page, says that you were too  
7 sick to work." (A.R. 69.) When she failed to do so, the ALJ boldly  
8 stated, in derogation of his duty to be "especially diligent in  
9 exploring for all the relevant facts," that he was "not going to hunt  
10 for 50 pages of lab reports," and "d[id] [not] want to have to go  
11 through and read all of [the lab reports]." Tonapetyan, 242 F.3d at  
12 1150; (A.R. 69.) Taking the ALJ's statements at face value, the Court  
13 cannot be certain that the ALJ actually read and considered all the  
14 evidence of record. Indeed, after reviewing the record, specifically  
15 the "50 pages of lab reports" that the ALJ did not "want to have to go  
16 through," the Court notes, as does plaintiff's counsel, that some pages  
17 are missing, *i.e.*, of a four-page exhibit, pages one through three  
18 appear to be missing. (A.R. 158; Joint Stip. at 9.). Moreover, not  
19 only did the ALJ fail to endeavor to obtain pages missing from  
20 plaintiff's lab reports, but the ALJ also failed to ask any questions  
21 regarding the pages of plaintiff's lab reports that were included in the  
22 record, which bear directly on the nature and extent of plaintiff's  
23 claimed limitations.

24  
25 Further, the ALJ failed to develop the record regarding plaintiff's  
26 psychiatric impairment and treatment. (Joint Stip. at 10.) The ALJ  
27 rejected plaintiff's claim of depression, indicating that "her  
28 depression never rose to the level that it required any ongoing formal



1 mental health treatment." (A.R. 17.) However, the record includes  
2 psychiatric records from Kaiser Permanente from June 2004, through  
3 November 2004, as well as progress reports from plaintiff's treating  
4 physician, one of which is dated February 8, 2005, which document that  
5 plaintiff was "being followed by psychiatry" and was taking several  
6 anti-depressant and anti-anxiety medications, including Prozac and  
7 Ativan. (A.R. 225, 255-57, 258-61.) As plaintiff correctly notes, the  
8 February 2005 progress note, indicating that plaintiff was still in  
9 psychiatric treatment, suggests that other, relevant psychiatric records  
10 may exist. The ALJ should have developed the record on this issue by  
11 asking questions about plaintiff's mental health treatment and by  
12 attempting to obtain plaintiff's psychiatric records.<sup>2</sup> (A.R. 225; Joint  
13 Stip. at 10.)

14  
15 As plaintiff was not represented by counsel, the ALJ had a  
16 heightened responsibility to assist plaintiff during the hearing and to  
17 develop all facts, both for and against disability, so that the ALJ  
18 could make a proper disability determination on a complete record.  
19 Tonapetyan, 242 F.3d at 1150. The ALJ failed to satisfy his duty here.  
20 Although defendant correctly notes that plaintiff's counsel, whom  
21 plaintiff retained prior to requesting review of the ALJ's decision by  
22 the Appeals Council, had the opportunity to supplement the record, the  
23 ALJ has the duty to develop the record, even where a claimant is  
24 represented by counsel. Brown v. Heckler, 713 F.2d 441, 443 (9th Cir.

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25  
26 <sup>2</sup> It is especially important for the ALJ to develop the record fully  
27 and fairly with respect to plaintiff's claimed mental impairment,  
28 because, not only was plaintiff unrepresented at the hearing, but, as  
plaintiff asserts, "[p]sychiatric records cannot be obtained by the  
patient as the records will not be released to the individual under  
treatment." (Joint Stip. at 10.)

1 1983). While defendant's point is well-taken, the ALJ should have, and  
2 did not, seek to develop the record fully by attempting to obtain all of  
3 plaintiff's relevant medical records.

4  
5 Finally, the Court believes that the ALJ's assertion regarding  
6 plaintiff's purported decision to seek an 11-month closed period of  
7 disability -- plaintiff "stated at the hearing that she was amending her  
8 application to request a 'closed period' of disability from August 2,  
9 2004 to July 2, 2005" (A.R. 13) -- reflects the result-oriented and  
10 hostile manner with which the ALJ approached plaintiff's claim. Indeed,  
11 after reviewing the hearing transcript, the Court concludes that  
12 plaintiff did not, by her testimony or otherwise, "amend[] her  
13 application" to request a closed period of disability. (A.R. 13.) In  
14 fact, plaintiff testified that her treatment for hepatitis C lasted for  
15 48 weeks, but that she continued to experience debilitating side-effects  
16 from the treatment for the next few months, or at least until October  
17 2005. (A.R. 44-46.) The hostile approach to plaintiff may also  
18 explain, but clearly does not justify, the ALJ's failure to fully and  
19 fairly assess the record.

20  
21 Accordingly, this matter should be remanded for the ALJ to obtain  
22 and consider any and all outstanding medical records, including  
23 psychiatric records, treatment notes, and laboratory results, and to  
24 determine what impact, if any, they may have on the ultimate  
25 determination of whether plaintiff was disabled for a period of 12  
26 months or longer.

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1 **II. The ALJ Failed To Set Forth The Requisite Specific And Legitimate**  
2 **Reasons For Rejecting The Opinion Of Plaintiff's Treating**  
3 **Physician, And The ALJ Improperly Relied On The Opinion Of The**  
4 **Consultative Examiner.**

5  
6 In assessing a claimant's residual functional capacity, the Social  
7 Security Administration's regulations favor "the opinion of a treating  
8 physician over non-treating physicians." Orn, 495 F.3d at 631; see also  
9 Reddick v. Chater, 157 F.3d 715, 725 (9th Cir. 1998); 20 C.F.R. §  
10 404.1527(d)(1)-(2). Generally, a treating physician's opinion is given  
11 greater weight, because "he is employed to cure and has a greater  
12 opportunity to know and observe the patient as an individual."  
13 Magallanes v. Brown, 881 F.2d 747, 751 (9th Cir. 1989)(citation  
14 omitted). If a treating physician's opinion is "well-supported by  
15 medically-acceptable clinical and laboratory diagnostic techniques and  
16 is not inconsistent with the other substantial evidence in [the] case  
17 record, [the Commissioner] will give it controlling weight." 20 C.F.R.  
18 § 404.1527(d)(2).

19  
20 If there is "substantial evidence" in the record that contradicts  
21 the opinion of a treating physician, such as an examining physician's  
22 opinion supported by independent clinical findings, the opinion of the  
23 treating physician is no longer entitled to controlling weight. Orn,  
24 495 F.3d at 632. However, a finding that the treating physician's  
25 opinion "is not entitled to controlling weight does not mean that the  
26 opinion is rejected." Social Security Ruling 96-29 at 1 ("In many  
27 cases, a treating source's medical opinion will be entitled to the  
28 greatest weight and should be adopted, even if it does not meet the test

1 for controlling weight." ). In such an instance, the Social Security  
2 regulations still require deference to the treating physician's opinion,  
3 but the weight accorded it is governed by the factors listed in the  
4 regulations, such as length, nature, and extent of the treatment  
5 relationship, frequency of examination, and supportability. 20 C.F.R.  
6 § 404.1527(d)(2); Orn, 495 F.3d at 632-33. When the opinion of a  
7 treating physician is contradicted, it may be rejected by the ALJ only  
8 for "specific and legitimate" reasons based on substantial evidence in  
9 the record. Reddick, 157 F.3d at 725; Lester v. Chater, 81 F.3d 821,  
10 830 (9th Cir. 1995).

11  
12 In a letter dated July 5, 2005, plaintiff's treating physician,  
13 Afshin Khatibi, M.D., who specializes in gastroenterology, stated that  
14 plaintiff was "evaluated and treated in this clinic for a chronic  
15 medical condition [hepatitis C] with treatment starting on August 5th,  
16 2004 and continuing for 48 weeks." (A.R. 133.) Dr. Khatibi reported  
17 that the [s]ide effects from this treatment are often quite severe and  
18 include fatigue, lethargy, insomnia, depression, fevers, diarrhea,  
19 anemia (which requires additional therapy to correct) and overall  
20 inability to perform regular work." (*Id.*) On July 5, 2005, Dr. Khatibi  
21 opined that plaintiff "was unable to work due to [the] above symptoms  
22 from August 5th, 2004 and will likely require several months for her  
23 symptoms to completely resolve now that she has completed therapy."  
24 (*Id.*)

25  
26 In a follow-up letter, dated January 16, 2007, Dr. Khatibi set  
27 forth the details of the treatment plaintiff underwent for hepatitis C,  
28 and he reported the significant side effects that plaintiff suffered as

1 a result of the treatment. (A.R. 252.) Dr. Khatibi stated that  
2 plaintiff suffered from headaches, abdominal pain, fatigue, and anemia.  
3 (*Id.*) In addition, Dr. Khatibi noted that plaintiff experienced  
4 dizziness, mood swings, insomnia, nausea, diarrhea, and a dry cough.  
5 (*Id.*) Plaintiff also experienced significant weight loss, joint aches,  
6 blurred vision, depression, and anxiety. (*Id.*) In October 2005, Dr.  
7 Khatibi reported that plaintiff continued to have "persistent anemia,  
8 and abdominal pain," and in November 2005, she developed an abnormal  
9 thyroid condition which later required thyroid replacement therapy.  
10 (*Id.*) As of January 2006, plaintiff reported "still feeling 'tired.'" (*Id.*)  
11  
12

13 The ALJ rejected Dr. Khatibi's opinion and instead relied on the  
14 opinion of the consultative examiner, Dr. Gwartz, in assessing  
15 plaintiff's residual functional capacity. (A.R. 16-18.) However, the  
16 reasons set forth by the ALJ for rejecting Dr. Khatibi's opinion were  
17 not legitimate, and the ALJ's reliance on Gwartz's opinion was not based  
18 on substantial evidence.  
19

20 The ALJ's primary reason for rejecting Dr. Khatibi's opinion was  
21 that his opinion was not supported by the medical evidence of record.  
22 (A.R. 17.) However, a review of the record indicates otherwise. The  
23 record is replete with treatment notes and progress reports documenting  
24 the significant side effects and attendant limitations plaintiff  
25 experienced as a result of her hepatitis C treatment, through at least  
26 early 2006, which were consistent with Dr. Khatibi's opinion. (See A.R.  
27 232 - August 16, 2005: plaintiff treated with primary care physician  
28 for abdominal pain and vomiting; A.R. 234 - August 24, 2005: plaintiff

1 reported epigastric discomfort; A.R. 236 - September 19, 2005:  
2 plaintiff continues to suffer from anemia; A.R. 237-38 - November 10,  
3 2005: plaintiff diagnosed with subclinical hypothyroidism due to  
4 Interferon treatment, as well as complaints of fatigue, tiredness, and  
5 weight gain; A.R. 239 - November 24, 2005: back and lower abdominal  
6 pain, and vomited three times; A.R. 240 - January 19, 2006: treating  
7 for abdominal pain; A.R. 241 - January 27, 2006: abdominal and lower  
8 back pain, and diarrhea for 3 days; A.R. 243 - March 3, 2006: lower  
9 back and joint pain; A.R. 244 - March 8, 2006: lower back pain and  
10 joint pain, depression, and anxiety; A.R. 245 - March 23, 2006:  
11 depression, start Prozac; A.R. 246 - May 25, 2006: depression, increase  
12 Prozac dosage.) As plaintiff correctly notes, the ALJ discussed only a  
13 scant ten pages of plaintiff's medical records in rendering his  
14 decision, rather than considering and summarizing the evidence of record  
15 as a whole. (A.R. 16-17; Joint Stip. at 30.) While plaintiff's  
16 symptoms may have "waxed and waned in intensity," as the ALJ noted,  
17 plaintiff's symptoms clearly persisted, as Dr. Khatibi opined they  
18 likely would, throughout the duration of her treatment and for several  
19 months after her treatment ended.<sup>3</sup>

20  
21 Further, as plaintiff's treating doctor, with whom plaintiff  
22 treated on a regular and consistent basis, Dr. Khatibi was in the best  
23 position to render an opinion regarding the nature and extent of  
24 plaintiff's impairments. His opinion should have been given great

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25  
26 <sup>3</sup> The ALJ correctly noted that "at no time was [plaintiff] ever  
27 described as severely or persistently physically debilitated." (A.R.  
28 17.) This is not a legitimate reason for rejecting the opinion of a  
treating physician. There is no requirement that a physician use "magic  
words," such as those suggested by the ALJ, for a plaintiff to qualify  
for disability benefits.

1 weight. See 20 C.F.R. § 404.1527(d)(2) (stating that generally more  
2 weight is given to opinions from treating sources since those sources  
3 are likely to be the medical professionals most able to provide a  
4 detailed, longitudinal picture of the claimant's medical impairment(s)  
5 and may bring a unique perspective to the medical evidence that cannot  
6 be obtained from the objective medical findings alone or from reports of  
7 individual examinations, such as consultative examinations or brief  
8 hospitalizations). Moreover, as a specialist in gastroenterology, Dr.  
9 Khatibi's opinion should have been given more weight than the opinion of  
10 a source who is not a specialist. See 20 C.F.R. § 404.1527(d)(5); see,  
11 e.g., Benecke v. Barnhart, 379 F.3d 587,594 n.4 (9th Cir. 2004)(stating  
12 that opinion of specialist about medical issues related to that  
13 specialist's area of specialty is to be given greater weight).

14  
15 The ALJ relied, at least in part, on the opinion Dr. Gwartz, the  
16 internal medicine consultative examiner, in formulating his residual  
17 functional capacity assessment. (A.R. 18.) However, a review of Dr.  
18 Gwartz's opinion shows that it was based upon a limited physical  
19 examination and plaintiff's self-reported history, and only modest  
20 objective testing, such as range of motion testing, an assessment of  
21 plaintiff's vital signs, and a liver function study. (A.R. 149-55.)  
22 Critically, in his report, Dr. Gwartz noted that "[t]here were no  
23 medical records available for review." (A.R. 150.) In view of this, it  
24 is unclear whether Dr. Gwartz based his assessment on a sufficiently  
25 complete picture of plaintiff's condition. See 20 C.F.R. § 404.1517  
26 ("If we arrange for [a consultative] examination or test, . . . [w]e  
27 will also give the examiner any necessary background information about  
28 your condition."); see also Ladue v. Chater, 1996 WL 83880, \*5 (N.D.

1 Cal. 1996)(requiring remand where "[t]he ALJ failed to conform to 20  
2 C.F.R. § 404.1517 requiring that the consultative examiner be provided  
3 with necessary background information regarding the claimant's  
4 condition," in a case in which consultative examiner "was provided with  
5 only one progress note from Kaiser," and court found that "it appears  
6 from the record that the ALJ gave [the] consultative report considerable  
7 weight, even though [the consultative examiner] was lacking important  
8 background information regarding plaintiff"). Here, unlike in Ladue,  
9 Dr. Gwartz was not provided with any of plaintiff's medical records.  
10 See Nalley v. Apfel, 100 F. Supp. 2d 947, 953 (S.D. Iowa 2000)("when a  
11 claimant is sent to a doctor for a consultative examination, all the  
12 available medical records should be reviewed by the examiner"); Hurstrom  
13 v. Barnhart, 233 F. Supp. 2d 1159, 1166 (S.D. Iowa 2002)("There is no  
14 indication that either [consultative physician] had access to any of the  
15 medical records which were available at the time of their examinations.  
16 . . . Even if Plaintiff told the consulting doctors that he had no  
17 limitations, these statements are not credible in light of the numerous  
18 laboratory reports showing that his blood sugar is out of control.").

19  
20 Consequently, because Dr. Gwartz's assessed plaintiff's residual  
21 functional capacity without a review of her medical records, the Court  
22 cannot conclude that it constitutes substantial evidence. See 20 C.F.R.  
23 § 404.1545(a) (a claimant's residual functional capacity is an  
24 assessment based upon all of the relevant evidence); Morgan v. Comm'r of  
25 Soc. Sec. Admin., 169 F.3d 595, 600 (9th Cir. 1999)(medical expert  
26 opinions constitute substantial evidence only when they are supported by  
27 the record and consistent with it).



1 On remand, if after clarifying and developing the record,<sup>4</sup> the ALJ  
 2 still concludes, *based on all the relevant medical evidence*, Dr.  
 3 Khatibi's opinion should be rejected, then the ALJ must provide specific  
 4 and legitimate reasons for rejecting it.

5  
 6 **III. The ALJ Failed To Provide The Requisite Clear And Convincing**  
 7 **Reasons For Rejecting Plaintiff's Subjective Pain Testimony.**

8  
 9 The law is well-settled that, once a disability claimant produces  
 10 evidence of an underlying physical impairment that is reasonably likely  
 11 to be the source of her subjective symptom(s), all subjective testimony  
 12 as to the severity of the symptoms must be considered. Moisa v.  
 13 Barnhart, 367 F.3d 882, 885 (9th Cir. 2004); Bunnell v. Sullivan, 947  
 14 F.2d 341, 345 (9th Cir. 2001)(*en banc*); see also 20 C.F.R. § 404.1529(a)  
 15 (explaining how pain and other symptoms are evaluated). Unless there is  
 16 affirmative evidence showing that the claimant is malingering, the ALJ's

17  
 18 <sup>4</sup> The ALJ should have contacted plaintiff's treating physician for  
 19 clarification of his opinion, if, as the following question posed by the  
 20 ALJ appears to indicate, he found plaintiff's treating physician's July  
 2005 opinion to be inadequate and unclear:

21 Q: Your doctor said you were being treated for 48 weeks, but  
 22 he didn't tell us what you could do and what you couldn't  
 23 do, he just said he was treating you. That's your  
 24 treating physician, in July of 2005, he said you have  
 25 completed 48 weeks of therapy for an unspecified GI  
 disorder. And she, he said you have an overall . . .  
 inability to perform regular work since August 5, 2004,  
 but he didn't give any specific functions that you were  
 unable to perform, or any reasons why you were unable to  
 perform regular work, whatever that is in his mind . . .

26 (A.R. 47.) See 20 C.F.R. § 404.1512(e) (duty to re-contact treating  
 27 physician); Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002)  
 28 (highlighting requirement that Commissioner re-contact treating source  
 when information from treating source is inadequate to make a  
 determination regarding disability).

1 reasons for rejecting the claimant's subjective symptom testimony must  
2 be "clear and convincing." Lester, 81 F.3d at 834. Further, the ALJ's  
3 credibility findings must be "sufficiently specific" to allow a  
4 reviewing court to conclude that the ALJ rejected the claimant's  
5 testimony on permissible grounds and did not arbitrarily discredit the  
6 claimant's testimony. Moisa, 367 F.3d at 885.

7  
8 Both in her filings with the Commissioner and in her testimony,  
9 plaintiff described various subjective symptoms from which she claimed  
10 to suffer. In a Function Report - Adult questionnaire dated November  
11 18, 2004, plaintiff complained that "[her] joint[s] hurt so [she] [could  
12 not] lift things over 15 pounds [and] to bend or stand for long periods  
13 cause[d] [her] a lot of pain. [She] [felt] dizzy much of the time[,]  
14 notice[d] that [she] [forgot things] a lot and [she] ha[d] a hard time  
15 concentrating." (A.R. 113.) Plaintiff also stated that she [felt] like  
16 [she] ha[d] flu symptoms at least 4 to 5 days [per week], [her] muscles  
17 hurt [and] her bones ache[d]." (A.R. 115.)

18  
19 Further, plaintiff testified that, as a result of her Interferon  
20 therapy treatment for hepatitis C, she suffered significant side-  
21 effects, including: "vomiting, diarrhea, fevering, all of [her] bones  
22 [would] hurt, [she] felt super tired, dizzy, [she] lost a lot of  
23 weight[, and she] was losing [her] vision." (A.R. 42.) Plaintiff  
24 testified that on some days, she "couldn't even get out of bed," because  
25 she "felt very weak" and "would tremble all over." (A.R. 42-43.) In  
26 response to the ALJ's question regarding why plaintiff was unable to  
27 work, plaintiff stated:

1 How can I possibly work, if I get up in the morning, . . . I  
2 was vomiting 10 times a day, and diarrhea at the same time I  
3 was sitting, having so much diarrhea and vomiting I couldn't  
4 sleep. My husband had . . . to help me bathe [be]cause I  
5 didn't have the strength of the balance, [be]cause I fell in  
6 the bath tub, my husband would sit me in the tub and he bathed  
7 me and washed my hair. How am I going to work if I can't even  
8 get up without fear of falling over. I would [have] terrible  
9 insomnia, I went sometimes days without sleeping. I got a  
10 thyroid problem as a consequence, [and] anemia . . . .  
11

12 (A.R. 43.) Critically, plaintiff testified that she was "still sick  
13 eight months after [she] stopped the treatment," and that she "started  
14 to feel better . . . [in] February, March . . . [of] 2006." (A.R. 45,  
15 77.)  
16

17 In his decision, the ALJ rejected the credibility of plaintiff's  
18 subjective complaints regarding her inability to work even during the  
19 48-week course of Interferon therapy (A.R. 19, ¶ 5), based upon:  
20 apparent inconsistencies in plaintiff's testimony; plaintiff's ability  
21 to engage in limited household chores; and a lack of medical evidence to  
22 support her contentions. (A.R. 17-18.) When examined in the light of  
23 the record as a whole, these reasons does not withstand scrutiny.  
24

25 First, the ALJ rejected plaintiff's complaints regarding her  
26 subjective symptoms based upon what the ALJ characterized as  
27 inconsistencies in plaintiff's statements. (A.R. 17-18.) For example,  
28 the ALJ noted that "[plaintiff] stated on a November 2004 questionnaire

1 that she was basically unable to do any normal activities," but then  
2 "the questionnaire completed by [plaintiff's husband] stated that  
3 [plaintiff] was able to do the laundry, dishes, light cooking, and make  
4 the bed." (*Id.*) However, the ALJ mischaracterizes the record. A review  
5 of the record as a whole indicates that, in a Function Report - Adult  
6 questionnaire dated November 18, 2004, while plaintiff stated that she  
7 felt "weak, tired, and sleepy," she also stated that she was able to do  
8 some light household chores and cook "occasionally." (A.R. 110, 115.)  
9 Specifically, plaintiff stated that "sometimes [she] wash[es] the  
10 dishes," "wash[es] the clothes 2 times a week," and cooks "some frozen  
11 meals and very simple stuff [such as] beans, rice or meat." (A.R. 110.)  
12 Consistent with plaintiff's statements, plaintiff's husband stated in a  
13 Function Report Adult Third Party questionnaire dated November 18, 2004,  
14 that plaintiff "does not cook as much. She usually cooks frozen foods,  
15 easy to cook items such as beans, rice or chicken." (A.R. 118.)  
16 Moreover, and again consistent with plaintiff's statements, plaintiff's  
17 husband stated that he "often help[s] [plaintiff] with household chores  
18 because she is to[o] tired (fatigued) or is feeling ill," but that  
19 plaintiff is able to do some house hold chores "about twice a week."  
20 (A.R. 116, 118.) The ALJ may not, as he did here, reach a conclusion  
21 first and then justify it by ignoring competent evidence in the record.  
22 See Regennitter v. Comm'r, 166 F.3d 1294, 1297 (9th Cir. 1999)  
23 ("inaccurate characterization of the evidence" constitutes error);  
24 Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984). Accordingly,  
25 the ALJ's selective reading of the record, to justify his adverse  
26 credibility finding, constitutes error.

27  
28 Second, although it is not entirely clear, the ALJ seemed to reject

1 the credibility of plaintiff's statements regarding the nature and  
2 extent of her subjective symptoms, because her husband stated that  
3 "[plaintiff] was able to do the laundry, dishes, light cooking, and make  
4 the bed." (A.R. 18.) However, the ALJ's casual reference to  
5 plaintiff's limited ability to engage in daily activities to support his  
6 rejection of plaintiff's subjective complaints fails to demonstrate how  
7 plaintiff's limited performance light household chores translates into  
8 the ability to engage in full-time work. See Gonzalez v. Sullivan, 914  
9 F.2d 1197, 1201 (9th Cir. 1990)(noting that daily activities may not be  
10 relied upon to support an adverse credibility decision where those  
11 activities do not affect the claimant's ability to perform appropriate  
12 work activities on an ongoing and daily basis); Fair v. Bowen, 885 F.2d  
13 597, 602 (9th Cir. 1989)("if a claimant is able to spend a substantial  
14 part of [her] day engaged in pursuits involving the performance of  
15 physical functions that are transferable to a work setting, a specific  
16 finding [which was not made in the instant case] as to this fact may be  
17 sufficient to discredit an allegation of disabling excess pain.").

18  
19 Finally, the ALJ's assertion that "[t]he medical evidence does not  
20 support the contentions of [plaintiff]" is not a convincing reason in  
21 and of itself to reject plaintiff's subjective complaints. (A.R. 16.)  
22 It is well-settled that an ALJ may not discredit a claimant's subjective  
23 claims of disabling limitations for the sole reason that the alleged  
24 degree of her limitation(s) is not fully supported by the objective  
25 medical evidence. See Fair, 885 F.2d at 601-02; Stewart v. Sullivan,  
26 881 F.2d 740, 743-44 (9th Cir. 1989). Plaintiff is not required to  
27 adduce medical evidence sufficient to corroborate the severity of her  
28 alleged limitations resulting from the significant side effects she

1 claimed to suffer.<sup>5</sup>

2  
3 Accordingly, the ALJ's rejection of plaintiff's credibility without  
4 setting forth clear and convincing reasons for the rejection constitutes  
5 reversible error. On remand, the ALJ must provide reasons, if they  
6 exist and in accordance with the requisite legal standards, for  
7 discrediting plaintiff's subjective symptom testimony.

8  
9 **IV. The ALJ Should Reconsider The Lay Witness Statements Of Plaintiff's**  
10 **Husband On Remand.**

11  
12 In evaluating the credibility of a claimant's assertions of  
13 functional limitations, the ALJ must consider lay witnesses' reported  
14 observations of the claimant. Stout, 454 F.3d at 1053. "[F]riends and  
15 family members in a position to observe a claimant's symptoms and daily  
16 activities are competent to testify as to [the claimant's] condition."  
17 Dodrill v. Shalala, 12 F.3d 915, 918-19 (9th Cir. 1993); 20 C.F.R. §  
18 404.1513(d)(4) ("we may also use evidence from other sources to show the  
19 severity of your impairment(s) . . . Other sources include, but are not  
20 limited to . . . spouses, parents and other care-givers, siblings, other  
21 relatives, friends, neighbors, and clergy"). "If an ALJ disregards the  
22 testimony of a lay witness, the ALJ must provide reasons 'that are  
23 germane to each witness.'" Bruce v. Astrue, 557 F.3d 1113, 1114 (9th  
24 Cir. 2009)(citation omitted). Further, the reasons "germane to each

25  
26 <sup>5</sup> It is important to note that, although the ALJ rejected plaintiff's  
27 credibility regarding her subjective symptom complaints, the ALJ  
28 conceded that "[plaintiff's] fatigue, gastrointestinal problems, and  
joint pains are consistent with the side effects of Interferon therapy."  
(A.R. 17.)

1 witness" must be specific. Stout, 454 F.3d at 1054 (explaining that  
2 "the ALJ, not the district court, is required to provide specific  
3 reasons for rejecting lay testimony").

4  
5 An ALJ may "properly discount lay testimony that conflict[s] with  
6 the available medical evidence" (Vincent v. Heckler, 739 F.2d 1393, 1395  
7 (9th Cir. 1984)), particularly, when, as in Vincent, "lay witnesses  
8 [are] making medical *diagnoses*," because "[s]uch medical diagnoses are  
9 beyond the competence of lay witnesses and therefore do not constitute  
10 competent evidence." Nguyen v. Chater, 100 F.3d 1462, 1467 (9th Cir.  
11 1996)(original emphasis). When as here, however, a lay witness  
12 testifies about a claimant's symptoms, such testimony is competent  
13 evidence and cannot be disregarded without comment. *Id.* Under Stout,  
14 "where the ALJ's error lies in a failure to properly discuss competent  
15 lay testimony favorable to the claimant, a reviewing court cannot  
16 consider the error harmless unless it can confidently conclude that no  
17 reasonable ALJ, when fully crediting the testimony, could have reached  
18 a different disability determination." 454 F.3d at 1055.

19  
20 At the hearing, plaintiff's husband testified that he observed  
21 plaintiff suffer from "fatigue, lethargy, insomnia, depression, fever,  
22 diarrhea and anemia." (A.R. 73.) He further testified that plaintiff's  
23 symptoms "lasted a lot longer than just one, two, three months after"  
24 her Interferon treatment for hepatitis C ended, until "well into the end  
25 of 2005, January, 2006." (A.R. 73, 75.)

26  
27 Here, the ALJ rejected the credibility of plaintiff's husband's  
28 statements regarding plaintiff's symptoms. (A.R. 16.) In rejecting the

1 husband's statements, however, the ALJ stated only that "[t]he medical  
2 evidence does not support the contentions of [plaintiff's] . . .  
3 husband." (*Id.*) Contrary to the ALJ's conclusion, plaintiff's  
4 husband's testimony is supported by the medical evidence, which  
5 documents the various subjective symptoms about which plaintiff  
6 complained. More importantly, under the clearly established Ninth  
7 Circuit precedent, this one reason is not sufficiently "specific" to  
8 warrant rejection of the testimony of plaintiff's husband regarding  
9 plaintiff's symptoms. See Stout, 454 F.3d at 1054 (explaining that "the  
10 ALJ, not the district court, is required to provide specific reasons for  
11 rejecting lay testimony").

12  
13 As this case is being remanded for further development of the  
14 record, and proper consideration of both the opinion of plaintiff's  
15 treating physician and the credibility of plaintiff's statements, the  
16 ALJ should reconsider the testimony and statements made by plaintiff's  
17 husband regarding his observations of plaintiff's subjective symptoms,  
18 and the ALJ must provide more specific reasons for rejecting the  
19 credibility of plaintiff's husband's statements.

20  
21 **V. Remand Is Required.**

22  
23 The decision whether to remand for further proceedings or order an  
24 immediate award of benefits is within the district court's discretion.  
25 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no  
26 useful purpose would be served by further administrative proceedings, or  
27 where the record has been fully developed, it is appropriate to exercise  
28 this discretion to direct an immediate award of benefits. *Id.* at 1179



1 ("the decision of whether to remand for further proceedings turns upon  
2 the likely utility of such proceedings"). However, where there are  
3 outstanding issues that must be resolved before a determination of  
4 disability can be made, and it is not clear from the record that the ALJ  
5 would be required to find the claimant disabled if all the evidence were  
6 properly evaluated, remand is appropriate. *Id.*

7  
8 Although plaintiff has not challenged the ALJ's conclusion that  
9 plaintiff's mental impairment is not "severe," the record is replete  
10 with references to and diagnoses of depression, and plaintiff is taking  
11 medication for depression. (See, e.g., A.R. 133, 217, 225, 227, 231,  
12 251-52, 256-7, 265.) Even the ALJ noted that plaintiff "is still taking  
13 medicine for depression." (A.R. 15.) On remand, the ALJ must consider  
14 the impact of all of plaintiff's impairments, whether "severe" or not,  
15 on her ability to engage in and sustain full-time work. See Erickson v.  
16 Shalala, 9 F.3d 813, 817 (9th Cir. 1993) (ALJ must consider "all factors"  
17 that might have a significant impact on claimant's ability to work); see  
18 also 20 C.F.R. § 404.1545(e) ("we will consider the limiting effects of  
19 all your impairment(s), even those that are not severe").

20  
21 Here, remand is the appropriate remedy to allow the ALJ the  
22 opportunity to remedy the above-mentioned deficiencies and errors and to  
23 assess properly whether plaintiff was unable to work on a sustained  
24 basis for a period of 12 months or longer commencing on August 2, 2004,  
25 and continuing until, at the latest, October 12, 2006, when plaintiff  
26 resumed working. (See A.R. 49 - plaintiff testified that she "started  
27  
28

1 working [on] October 12th of 2006.")<sup>6</sup> See, e.g., Benecke, 379 F.3d at  
2 593 (remand for further proceedings is appropriate if enhancement of the  
3 record would be useful); McAllister v. Sullivan, 888 F.2d 599, 603 (9th  
4 Cir. 1989) (remand appropriate to remedy defects in the record).

5  
6 **CONCLUSION**

7  
8 Accordingly, for the reasons stated above, IT IS ORDERED that the  
9 decision of the Commissioner is REVERSED, and this case is REMANDED for  
10 further proceedings consistent with this Memorandum Opinion and Order.

11  
12 IT IS FURTHER ORDERED that the Clerk of the Court shall serve  
13 copies of this Memorandum Opinion and Order and the Judgment on counsel  
14 for plaintiff and for defendant.

15  
16 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

17  
18 DATED: February 23, 2010

19   
20 MARGARET A. NAGLE  
21 UNITED STATES MAGISTRATE JUDGE  
22  
23  
24  
25  
26

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27 <sup>6</sup> Both plaintiff and her husband testified that, by in or about  
28 February or March 2006, plaintiff "started to feel better." (A.R. 46,  
75-77.)